OUTER HOUSE, COURT OF SESSION

[2024] CSOH 59

CA31/23

OPINION OF LORD BRAID

In the cause

FORTHWELL LIMITED

Pursuer

against

PONTEGADEA UK LIMITED

Defender

Pursuer: Thomson KC; Brodies LLP
Defender: Dean of Faculty, Reid; Burness Paull LLP

13 June 2024

Introduction

[1] The pursuer and defender are respectively the tenant and landlord of premises at 11 Exchange Place, Glasgow, in terms of a lease dated 18 and 29 March 1996[1]. The pursuer took entry to the premises on or about 23 August 2013, since when its wholly owned subsidiary, Lynnet Leisure (Rogano) Limited, has traded therefrom as the Rogano Restaurant and Bar, a well-known Glasgow eating establishment.

[2] In this commercial action, the pursuer avers that between 9 December 2020 and 10 January 2021 substantial damage was caused to the premises as a result of three separate

[1] Neither was an original party to the lease but nothing turns on that.

incidents of flooding and/or water ingress. In terms of the lease, remedial work requires to be undertaken by the defender. The pursuer avers that in each incident the damage was caused by an "insured risk" under the lease; and, further, that as a result of this, and what is said to be the defender's breach of its obligation to maintain the common parts, Lynnet has been unable to trade from the premises, thereby sustaining a loss of profits.

[3] Insofar as material for present purposes, the pursuer seeks the following remedies:

(i) an order ordaining the defender to implement its obligation under the lease by carrying out certain specified works to reinstate the premises (the first conclusion);

(ii) failing decree as first concluded for, damages of just over £789,000 (the second conclusion);

(iii) damages of £178,696.94 for Lynnet's losses to date (the fourth conclusion);

(iv) damages of £934,056.13 for Lynnet's estimated future losses (the fifth conclusion).

[4] There are several contentious issues between the parties but for present purposes it is sufficient to note only the two which were discussed before me at a debate on the commercial roll. First, while the defender does not take issue with the pursuer's right to seek an order of specific implement as first concluded for, it argues that the pursuer may not seek damages in the alternative as second concluded for because, in terms of the lease, insurance cover was in place for the benefit of both parties in respect of the flooding risks which eventuated, such as to exclude a financial claim by one party against the other (the insurance issue). Second, the defender disputes the pursuer's entitlement to recover damages on behalf of Lynnet (the transferred loss issue). Consequently, the defender seeks dismissal of the second, fourth and fifth conclusions. The pursuer argues that its case in

relation to all three of those conclusions is suitable for inquiry and seeks a proof before answer (which is agreed in relation to all other matters in dispute). The fourth and fifth conclusions, of course, stand or fall together.

The insurance issue

The lease

[5] The material provision of the lease relating to insurance is clause 13, which provides:

> "13. The Landlord undertakes:
>
> 13.1. To effect and maintain the Property Insurance in name of the Landlord (but so long as the Landlord is able so to do, with the endorsement thereon of the respective interest of the Tenant and any permitted sub-tenant in such terms as to preclude the exercise by the insurance company of its subrogation rights against the Tenant and any such permitted sub-tenant) and to produce to the Tenant, but not more than once in any period of twelve months, a certificate from the Insurance Company stating details of the insurance including amount of cover, risks covered and the date to which the premiums have been paid.
>
> 13.2. In the event of the Premises being destroyed or so damaged by any of the Insured Risks and the Tenant has complied in full with clauses 4.2, 4.3 and 4.4 of the Lease, the Landlord will use all reasonable endeavours to obtain the consents of all parties whose consents are required for the rebuilding of the Premises including without prejudice to that generality local authority consents and consents of adjoining proprietors; and if such consents are obtained the Landlord will rebuild the Premises in accordance with the original plans and specifications, subject to any variation which may be necessary or in the Landlord's reasonable opinion desirable having regard to legislation, building standards, design considerations and the standard then considered appropriate for the finishes, fixtures and fittings of premises similar to the Premises, the Landlord making up any shortfall due to under insurance, the Tenant paying the Appropriate Portion of any excess of insurance for the Building (or if there is a separate policy for the premises) the whole of the excess."

Clauses 4.2, 4.3 and 4.4 set out certain obligations on the pursuer in relation to the payment of insurance premiums, with which the pursuer has complied. Stated shortly, the defender arranges the insurance but the pursuer pays for it. "Insured Risks" is defined as including loss or damage by bursting or overflowing of water apparatus or pipes, flood. It is common

ground that the pursuer's interest was noted on the policy in the terms envisaged in clause 13.1.

Defender's submissions

[6] The Dean of Faculty for the defender submitted that it was a clearly recognised principle of Scots law that where parties in a landlord/tenant relationship had agreed to effect insurance for the benefit of both, that was the sole resort to which they could have in the event of an insured risk materialising. They could not sue each other for damages. The rule always applied where there was joint insurance, but there was no need for there to be joint insurance provided the insurance inured for the benefit of both parties. The authorities cited in support of these propositions were: *The Ocean Victory* [2017] 1 WLR 1793; *Mark Rowlands Ltd* v *Berni Inns Ltd and Others* [1986] QB 211; *Barras* v *Hamilton* 1994 SC 544. Some earlier cases described the rule as a consequence of circuity of action - if an insurer paid out in respect of one of the parties entitled to the insurance, it was subrogated to the entitlement of the innocent party; but if the insurer claimed against that party it would be met with the defence that the party was insured, hence the insurer would be suing itself, which made no sense. However, the better view was that the matter was determined by looking at the terms of the contract between the parties and whether the parties could be said to have intended that one was precluded from recovering damages from the other where damage had been caused by an insured risk. Properly construed, both the lease and the insurance policy itself confirmed that the insurance in this case was joint, and so the rule applied. Even if it were not joint, the question remained: is it agreed that the insurance shall inure to the benefit of both parties? What else, asked the Dean rhetorically, could the endorsement of the tenant's interest on the policy mean? The present case was *a fortiori* of

Berni Inns, in which (in contrast to the present case) the tenant's name had not even been endorsed on the policy which was nonetheless held to inure for its benefit. It followed that while the pursuer could sue for implement under clause 13.2, it could not sue for damages in the event that the defender failed to carry out the work.

Pursuer's submissions

[7] Senior counsel for the pursuer submitted that the defender's submissions missed the point. As soon as it was accepted, as it was, that the pursuer could enforce clause 13.2 by way of implement, it must follow that it could seek the surrogate of damages in respect of that same clause in the event that reinstatement, for whatever reason, was not undertaken. Clause 4.2 provided that the tenant merely had to pay for the insurance that the landlord had to take out in its own name. That could not be joint insurance, nor could the endorsement on the policy make it so. The purpose of the endorsement, as the terms of clause 13.1 made clear, was merely to provide that the pursuer, as tenant, could not be sued for the occurrence of an insured risk caused by its negligence. That was the benefit held to inure to the tenant in *Berni Inns* and *Barras,* rather than any broader benefit inuring to both parties not to be sued. The pursuer accepted, having regard to *Ocean Victory,* that where there was joint insurance, one party could not sue the other for the occurrence of an insured risk; but that was not the situation here. There was nothing in the lease to support the defender's construction of it, namely that the parties had agreed that the landlord would undertake the obligation in clause 13.2 but that the only remedy for breach was specific implement, not damages. The averments in support of the second conclusion were suitable for inquiry.

Decision on the insurance dispute

[8] The most recent authority, which affirms that the question is one of contractual interpretation, is the Supreme Court case *Ocean Victory*, above. In that case Lord Mance said at paragraph 114 that:

> "It is well established … that, where it is agreed that insurance shall inure to the benefit of both parties to a venture, the parties cannot claim against each other in respect of an insured loss. This principle is now best viewed as resting on the natural interpretation of or implication from the contractual arrangements giving rise to such co-insurance."

In a similar vein he explained at paragraph 122 that the reason why there is no claim is that under a co-insurance scheme it is understood implicitly that there will be no such claim. For his part, Lord Toulson, at paragraph 139, also saw the question as one of contractual construction:

> "The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction ... The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action *for breach of a term of the contract which has caused that loss*" (emphasis added).

[9] In relation to the general principle, Lord Sumption was in agreement, stating at paragraph 99 that:

> "It is well established, and common ground between the present parties, that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other in respect of an insured loss. Co-insurance is the paradigm case"

He went on to say that the juridical basis of the rule was less clear, but that the better view was that it is an implied term of the contract of insurance and/or of the underlying contract between the co-insureds pursuant to which their interests were insured, the implication

being necessary because if the co-insureds are both insured against the relevant loss, the possibility of claims between them is financially irrelevant.

[10] In *Berni Inns*, above, the landlord had insured the entire building in its own name, the tenant not being named on the policy. The tenant was obliged to pay the landlord an insurance rent equal to the amount spent by the landlord in insuring that part of the building leased to the tenant. The whole building was destroyed by fire caused by the tenant's negligence. According to Kerr LJ at 221, the issue before the court was whether, under a lease in such terms, a landlord who has been fully indemnified by his insurers under a policy covering the risk of fire, whether caused by accident or negligence, can nevertheless recover damages from the tenant on the ground that the fire was caused by the tenant's negligence. At page 224, Kerr LJ noted that the tenant had conceded "inevitably" that it could not maintain that it was co-insured with the landlord under the policy. Nonetheless, the insurance had been effected by the landlord with the intention that it inure for the benefit of the tenant also. However, the real issue in the case (see page 228 E to F) was whether the terms of the lease, and the full indemnification of the landlord by its receipt of the insurance monies, precluded it from recovering damages in negligence from the tenant, or whether the landlord's right to recover such damages remained unaffected. Approaching the matter as one of construction, he concluded that the landlord had no such right, a conclusion with which the other members of the Court of Appeal agreed.

[11] The leading Scottish authority is *Barras*, above, where a landlord let one of four industrial units to a tenant on a verbal lease. It had been agreed between the parties that the landlord would arrange the building insurance and the tenant would pay the proportion of the premium attributable to the subjects let by him. Due to the tenant's alleged negligence, a fire broke out which resulted in all of the units being destroyed. The landlord sued the

tenant for the uninsured losses sustained by him in reinstating all four units. The temporary judge upheld an argument by the tenant that in insurance law, where the landlord was to arrange the insurance the tenant was entitled to say that any loss suffered by the landlord as a result of the subjects being destroyed by fire was to be recouped solely from the proceeds of the insurance even if the loss was caused by the tenants negligence. However, the Inner House held that the case did not turn on principles of insurance law, but on a construction of the terms of the verbal contract: see LJC Ross at 546 D to E. The intention of the parties had been that in the event of the subjects of let being damaged by fire from whatever cause, the landlord was to recoup his losses from the proceeds of the insurance policy with no further claim against the tenant; although the landlord was not precluded from seeking to recover from the tenant his losses in respect of the remaining units. Lord Ross went on to consider *Berni Inns* and whether it was inconsistent with two Scottish cases, namely *Duke of Hamilton Trustees* v *Fleming* (1870) 9 Macph 329 and *Clark* v *Hume* (1902) 5F 252 but concluded that they could be distinguished on their facts. In contrast, the issue raised in *Berni Inns,* and a line of Canadian cases considered there, was not whether the tenant could participate in the proceeds of an insurance policy or could require the landlord to expend the proceeds so as to rebuild, but how the leases fell to be construed. In all of those cases, when it was said that the insurance effected by the landlord inured to the defendant's benefit, the benefit being referred to was the right not to be sued in respect of loss which had been covered by the insurance policy.

[12] Drawing all of this together, I conclude, from *Barras* and *Ocean Victory,* that the issue does not turn on insurance law, nor circuity of action based on rights of subrogation, but, more straightforwardly, turns on what the parties intended, which is a matter of construction of the lease. While it may well be that where the parties are joint insured, they

will invariably be found to have intended to preclude, as Lord Toulson put it in *Ocean Victory*, a claim by either of them for breach of the term of the contract which caused the loss, that need not inexorably follow and in any event does not preclude other terms of the contract from being enforced.

[13] Approaching the matter in that way, clause 13.1 expressly provides that the defender is to insure the property in its name, but that the tenant's interest is to be endorsed on it in such terms as to preclude the exercise by the Insurance Company of its subrogation rights against the purser (and any permitted sub-tenant). The reference to subrogation rights makes plain that the parties' intention was that the pursuer was not to be sued in respect of an insured loss. As in *Berni Inns* and *Barras*, that was the extent of the benefit which was to inure to the pursuer. No greater benefit than that was to be conferred on the pursuer; far less can the clause be construed as conferring any entitlement on the defender not to be sued.

[14] Since the case does not turn on any principle of insurance law, it is therefore strictly unnecessary to decide whether the insurance policy in the present case was a joint policy or not. However, given that it was to be a policy taken out by the defender in its own name, but paid for by the pursuer, it seems to me that, by definition, the parties did not intend that it should be a joint policy. (That this is so is confirmed by perusal of the policy itself, in which only the defender is named as the Insured; in addition to which, the policy conditions, under the heading "Subrogation" provide that the insurers shall not enforce any rights against any tenant or lessee of the premises, which reflects the terms of clause 13.1 of the lease.) Even assuming in the defender's favour that the contract was one of joint insurance, or at any rate one which inured for the benefit of both parties in the widest sense, the defender's argument would still fail, because the pursuer's claim in conclusion two is

not directed against the defender for breaching any term of the contract which led to the loss insured against (*cf* the dictum of Lord Toulson, above); rather it is for breaching an obligation which arose only after the loss was sustained, namely the obligation to reinstate the premises. That is an entirely different factual scenario from those under consideration in the authorities. Even if (contrary to the view expressed in para [13]) clause 13.1 confers *some* benefit on the landlord, it does not preclude the pursuer's right of action in this case; and it would be illogical if the pursuer were entitled to sue for specific implement, being one remedy available to it for breach of an obligation, but not entitled under any circumstances to pursue the alternative remedy of damages, for any loss caused by breach of that self-same obligation, if such loss could be proved. I accept that there may be circumstances where Scots law does recognise a right to enforce an obligation but not to recover damages: see for example Lord Drummond Young's observations in *McLaren, Murdoch and Hamilton Ltd* v *The Abercromby Motor Group Ltd* 2003 SCLR 323, at para [41], (referred to below in para [29] in the different context of the transferred loss issue). But Lord Drummond Young was talking there of the right of a contracting party to insist on performance of a contract even though he had sustained no loss. The defender's argument here is not that the pursuer has suffered no loss, simply that any loss it has sustained is an insured loss, which is a different point.

[15] That all said, I confess that it is not entirely clear to me in what circumstances in this case the pursuer might seek to invite the court to grant the second conclusion in preference to the first; nor, remembering that it is the defender which owns the premises, how the pursuer's loss would be quantified at the cost of repairs in the event the work was simply not done by the defender; but those points are not taken by the defender at this stage, and are best resolved after inquiry at proof.

[16] For all these reasons, the pursuer's averments in support of its second conclusion are not irrelevant for the reasons advanced by the defender, and I will find the pursuer entitled to a proof before answer on those averments, notwithstanding the reservations just expressed.

The transferred loss issue

Introduction

[17] The concept of transferred loss arises where a person, A, contracts with another, B, but due to B's non-performance of the contract a third party, C, suffers loss. Leaving aside situations where C has a direct remedy against B (for example, where the contract gives rise to a *jus quaesitum tertio*, or B has granted a collateral warranty in C's favour), the general rules are that (i) C is unable to sue B to recover its loss, since it has not contracted with B; and (ii) the loss cannot be recovered by A, because the innocent party in a contract can sue for, and recover, only its own losses, not those suffered by another. At least in some circumstances (for example, where the contract relates to a building owned not by A, but by C), application of the general rule can lead to an outcome which appears unjust; in that sense, the loss has been said, in such cases, to have fallen into a legal black hole.

[18] However, just as nature abhors a vacuum, so too does the law abhor legal black holes, or as Lord Drummond Young more eloquently put it in *McLaren, Murdoch and Hamilton Ltd* v *The Abercromby Motor Group Ltd* above, page 339: "in a well-regulated legal universe black holes should not exist"; and the courts have deployed a number of arguments (or, as it was put in one case, legal subterfuges) to justify a departure from general principles in such a way as to entitle C's loss to be recovered by A (hence the term, transferred loss) in certain circumstances.

[19] Arguments about transferred loss have arisen in a large number of factual situations, but the issue arises in this case because although the contract is between the pursuer and defender (respectively A and B in the above example), the loss of profits sued for, which is said to have been caused by the defender's breach of that contract in failing to maintain the common parts, has been sustained by the pursuer's wholly owned subsidiary, Lynnet (C), which is the entity that has been unable to trade as Rogano as a result of the alleged breach. The pursuer avers that it is entitled to recover that loss of profits from the defender (subject to an obligation then to account to Lynnet for any damages recovered); the defender counters that it has no such entitlement.

[20] Since the issue between the parties largely comes down to whether Scots law is the same as English law, or whether the (*obiter*) views expressed by Lord Drummond Young in *McLaren, Murdoch and Hamilton* are to be preferred and accurately represent modern Scots law, it is convenient to begin with a review of the authorities on either side of the border.

English law

[21] It has been held in English law that although the general rule is that a party to a contract can only recover, for a breach of the contract, such actual losses as he has himself sustained (*The Albazero* [1977] AC 774, Lord Diplock at 845G), there are exceptions to that rule. What has become known as "the *Albazero* exception" - somewhat ominously described by Professor MacBryde, *The Law of Contract in Scotland (3rd Edn)*, paragraph 22.26, as being "extraordinarily difficult to explain" - is, in essence, that a consignor of goods may recover damages from the ship owner if there was privity of contract between them, although if the goods were not his property or at his risk he must account to the true owner for any damages recovered. (In *The Albazero* itself, although the House of Lords approved the rule

to that effect formulated in the Scottish case of *Dunlop* v *Lambert* (1839) 6 Cl & F 600, it did not in fact apply the rule in the facts of that case, since the consignee had its own right of action under a bill of lading.)

[22] As so expressed, the rule is of somewhat narrow application, since it applies only to (some) contracts of carriage, but in such contracts, where it applies, it forms an exception to the general rule in that it permits the contracting party - A - to recover from the shipowner - B - a loss sustained by the owner of the goods, C. Later cases extended the rule to building contracts, where it was not goods on a ship, but a building, which passed from the ownership of A to C; in that context it has a somewhat wider application.

[23] In one such case, *Alfred McAlpine Construction Ltd* v *Panatown Ltd* [2001] 1 AC 518, the juridical basis for the *Albazero* exception was considered. Of particular interest for Scots lawyers is the speech of Lord Clyde, in the course of which he discussed whether the *Albazero* exception arose from the contracting parties' intention at the time their contract was entered into, or as a matter of law, intention being irrelevant, concluding, at page 530, C-D, that it was the latter:

> "In my view it is preferable to regard it as a solution imposed by the law and not as arising from the supposed intention of the parties, who may in reality not have applied their minds to the point. On the other hand if they deliberately provided for a remedy for a third party it can readily be concluded that they have intended to exclude the operation of the solution which would otherwise have been imposed by law. The terms and provisions of the contract will then require to be studied to see if the parties have excluded the operation of the exception."

In other words, in Lord Clyde's view, the exception arose as a matter of law *unless* parties had excluded it in their contract; and it is in this context that later in his speech, at 531H, he referred to the contemplation of the parties.

[24] It must be acknowledged that in treating the exception as arising as a matter of law, rather than something to be derived from what was in the parties' contemplation at the time

of contracting, Lord Clyde was in a minority of one. The other judges in the majority in *Panatown* were in the latter camp, encapsulated by Lord Jauncey at 568C, where he said:

> "That rule [the exception rule] provides a remedy where no other would be available for breach of a contract in circumstances where it is within the contemplation of contracting parties that breach by one is likely to cause loss to an identified or identifiable stranger to the contract, rather than to the other contracting party"

See also Lord Browne-Wilkinson at 575 E-F where he referred to what was "envisaged" by the parties.

[25] Two recent English cases founded upon by the defender appear at first sight to have hammered the nail into the coffin of Lord Clyde's approach, coming down squarely in favour of the "contemplation of the parties" test. In *Swynson Ltd* v *Lowick Rose LLP* [2018] AC 313, it was held by the Supreme Court that the principle of transferred loss applied where the known objective of a transaction was to benefit a third party and the anticipated effect of a breach of duty would be to cause loss to that third party. *BV Nederlandse Industrie van Eiprodukten* v *Rembrandt Enterprises Inc* [2020] QB 551, a decision of the Court of Appeal, was to similar effect: see in particular Coulson LJ at paragraphs 72-73.

[26] Thus, the position in English law, notwithstanding Lord Clyde's approach in *Panatown,* is that a party may sue for transferred loss only where such was in the contemplation of the contracting parties at the time the contract was entered into. Putting that more colloquially, if there was no such contemplation, there will be no black hole in to which the third party's loss will be deemed to have fallen and the contracting party will not be entitled to sue for the loss in question.

[27] However, the English position is more nuanced and complex than the foregoing brief summary might indicate. A common theme running through the case law, beginning before *Panatown* - originating in the speech of Lord Griffiths in *Linden Gardens Trust Ltd* v *Lenesta*

Sludge Disposals Ltd [1994] 1 AC 85 - is that there are, or may be, both narrow and broad grounds for applying the exception. The narrow ground applies where the property subject to the contract has been transferred to the third party, and necessarily entails that A will account to C for any damages recovered. The broad ground proceeds on the conceptual basis that where A contracts with B for a benefit to be conferred on C, although A himself has not suffered the physical or pecuniary damage sustained by C, he has nonetheless suffered his own damage being the loss of what has been described as his performance interest. If that were to be correct, of course, it casts doubt on the correctness of the general rule that A can only recover his own losses from B; in that regard see the speech of Lord Goff of Chieveley in *Panatown* at 544 C to F. For a further discussion of the difference between the two grounds, and the approach of the English courts, see the judgment of Coulson LJ in *Nederlandse* from paragraph 58, leading to the view he expressed at paragraph 73 that in order to succeed in a claim for transferred loss in reliance on the broader ground, the claimant must show that there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged. It is worth emphasising that in *Nederlandse* (and, for that matter, *Swynson*), where the facts were very different from those here and did not involve any transfer of property, it was the broader ground which was relied on and which was the focus of the discussion.

Scots law

[28] Other than *Dunlop* v *Lambert* itself, on which the *Albazero* exception is founded, there is a dearth of Scottish authority. As foreshadowed above, the leading modern Scottish judicial opinion is found in *McLaren, Murdoch and Hamilton*. In a passage which is admittedly *obiter*, Lord Drummond Young from para [33] closely analysed the English

authorities to that date, including Lord Clyde's speech in *Panatown.* In particular, at para [39] he considered whether in Scots law the *jus quaesitum tertio* might provide a solution to the problem, concluding that it would not, because of certain restrictions in its application, including that it would exclude any case in which one party to a contract was unaware that the other intended to benefit a third party such as a family member; and it would also exclude any case where the contract was for work on a particular property which was then transferred to a third party. He then considered the "performance interest" argument - the idea that a party to a contract can recover damages for breach even if he himself has suffered no loss (ie, the English "broad ground", although he did not refer to it as such). At paras [40] and [41] he firmly rejected the suggestion that this solution formed any part of Scots law, saying at [41] that "in Scots law a party to a contract should not be entitled to recover substantial damages for breach of contract merely by virtue of that breach."

[29] Lord Drummond Young's conclusion is in para [42] at pages 344F to 345A, and bears setting out at length:

> "I am accordingly of opinion that Scots law should adopt the same general rule as that applied by the majority of the House of Lords in [*Panatown*], as described by Lord Clyde … In effect the rule comes to this: if a breach of contract occurs, causing loss that can be measured in financial terms, the party who is not in breach may recover substantial damages even if that loss has been sustained by another person; if a loss has been sustained by a person other than the contracting party, however, the contracting party must sue on behalf of that other, and must accordingly account to that other for the damages recovered. The right to raise an action in this way is deemed by law to exist in any case where the loss resulting from the breach of contract occurs to a person other than the contracting party. It should not in my view be based on the intention of the parties; the right is rather conferred as a matter of general legal policy, to ensure that if a loss results from a breach of contract damages can be recovered from the party responsible for the breach; that was Lord Clyde's conclusion … Nevertheless, if the third party who suffers loss has a direct right of action against the party in breach of contract, for example under a duty of care warranty, there is no need for the contracting party to have a right of action on the third party's behalf, and the law will not deem such a right to exist."

[30] In *Marquess of Aberdeen and Temair* v *Messrs Turcan Connell* 2009 SCLR 336, Lady Smith agreed with Lord Drummond Young's approach, at para [45]:

> " … if a breach of contract occurs which causes loss that is capable of being measured financially, the innocent party may recover damages even if the loss in question has in fact been sustained by somebody else. In those circumstances, however, the pursuer sues on behalf of the person who has directly sustained the loss and is under an obligation to account to that other person in respect of any damages recovered. I would add that I agree with Lord Drummond Young that the emergence of this rule should be regarded as the identification of a right to raise an action which is deemed by law to exist in a case where loss resulting from a breach of contract occurs to someone other than the contracting party and is not a matter of identifying the express or implied intention of the parties to the contract. It does seem plain, on a proper reading of *Panatown* and the authorities referred to therein, that what is identified is actually a matter of policy rather than one of the ascertainment of contractual intention."

[31] Two further Scottish cases should be mentioned. In *Clark Contracts Ltd* v *The Burrell Co (Construction Management) Ltd (No 2)* 2003 SLT (Sh Ct) 73, Sheriff Taylor (as he then was) held that a claim for loss sustained by a third party was irrelevant, in circumstances where the third party had a *jus quaesitum tertio* and that there was no black hole or, as he put it, no need to resort to legal subterfuge. Finally in *Axon Well Intervention Products Holdings AS* v *Craig* [2015] CSOH 4, Lord Doherty, at para [29], agreed with Lord Drummond Young in *McLaren Murdoch and Hamilton*.

[32] Thus, the general thrust of the Scottish cases, though obiter, is that a party may sue for loss sustained by a third party in circumstances where the loss would otherwise fall into a metaphorical black hole, this being justified as a matter of policy rather than by resort to what the parties must have intended, intention being irrelevant. Additionally, the "broad grounds" for applying the exception, trailed in the English case law, has no place in Scots law, rendering much of the discussion in *Swynson* and *Nederlandse* academic from a Scottish perspective.

Parties' submissions

[33] For the defender, the Dean of Faculty acknowledged (a) that Lord Drummond Young's opinion, although *obiter*, demanded considerable respect and carried considerable weight and (b) that if that approach were followed, his submission that this part of the pursuer's claim was irrelevant must necessarily fail. However, he went on to submit that Lord Drummond Young's views should in this instance not be followed, but instead the principled approach, following English law, was that the loss sustained by a third party could be recovered only if it was within the contemplation of the parties at the time of contracting that benefit be conferred on the third party. Were it not so, the general rule that a person could recover only his own losses would be subsumed by the exception and would be no rule at all. Lord Drummond Young's views were premised on what Lord Clyde had said in *Panatown*, but Lord Clyde's approach was not adopted by the majority in that case. In any event, the law had been refined and explained since then, in *Swynson,* and *Nederlandse,* above. There was no reason, nor was it desirable, for Scots law to take a different approach from that taken in England, the more so when English law was founded on a readily discernible principle which would not sweep away the general rule.

[34] For the pursuer, senior counsel accepted that if Scots law were the same as English law, as expressed in *Swynson* and *Nederlandse*, the pursuer must necessarily fail, since it was not offering to prove that the licence to Lynnet was within the parties' contemplation when the lease was entered into. However, he submitted that there was no principled reason why the law in each jurisdiction should be the same. The defender's fears that the general rule would be subsumed into the exception were unfounded. The cases made clear that in practice the exception applied only in two situations: where the loss was sustained by a family member; or by a company in the same group. In the latter situation, the manner in

which group companies organise their affairs should not affect the liability of the contract breaker to pay damages. *The Albazero* rule was a pragmatic one developed by the law as a matter of policy on the basis that it was undesirable for substantial damages claims to go uncompensated. That the presumed intention of the parties was not a requirement was confirmed by the fact that both Lord Clyde and Lord Drummond Young had been of the view that the *jus quaesitum tertio* was not a complete answer to the problem.

Decision on the transferred loss issue

[35] This issue, as both parties accepted, in effect comes down to whether *Swynson* and *Nederlandse* should be followed in Scotland, notwithstanding the views expressed by Lord Drummond Young and Lady Smith. However, Lord Drummond Young, in the passages referred to above, cogently and persuasively explained why Scots law and English law are not the same in this area, and firmly rejected any suggestion that the "broad ground", which was the ground relied on in *Swynson* and *Nederlandse*, formed any part of Scots law. Having explained why the *jus quaesitum tertio* did not offer a solution, he offered a reasoned Scots law solution to the problem, recognising, as had Lord Clyde, that the right of the contracting party to sue was conferred as a matter of general legal policy to ensure that if a loss results from a breach of contract it can be recovered from the party responsible for the breach. With all of these views, Lady Smith agreed. Nothing that was said in *Swynson* and *Nederlandse* provides, nor could it provide, any reason for now concluding that Scots law in the intervening 20 years has aligned itself, or should align itself, with English law, or that Lord Drummond Young's summary of the principles of Scots law was, in some way, wrong.

[36] The Dean feared that on this approach, which he saw as unprincipled, the general rule is subsumed in the exception but I do not consider that fear to be justified. I do not agree that the approach proposed by Lord Drummond Young is unprincipled: he did not say that *any* loss sustained by a third party could be recovered by the contracting party, but confined his remarks to *the* loss resulting from the breach of contract, later pointing out that the usual rules on remoteness of damage continued to apply. A principled approach can therefore continue to be taken, which will prevent simply any loss, no matter by whom it was suffered and in what circumstances, from being recovered in a breach of contract claim. Further, on a practical level, as Lord Drummond Young recognised, the exception to the general rule is most likely to arise in cases where either the property which is the subject of the contract has been transferred to a third party, or the contracting party intended to benefit a third party such as a family member or a company in the same group. There is no realistic danger that the floodgates will be opened, or that the general principle will be swept up in the exception.

[37] By contrast, the problem with applying the exception only where there is an intention at the time of contracting to benefit the third party is that that leaves limited scope for the exception to apply at all, since in very many of those cases there will be a *jus quaesitum tertio*, and it is generally accepted that where the third party has a remedy and a direct right of action, there is no need for the exception.

[38] In the result, I conclude that English law is as different from Scots law today as it was in 2003, when Lord Drummond Young expressed his opinion, notwithstanding that the law in the two jurisdictions has a common starting point; and consequently, that the exception to the general rule exists in Scotland as a matter of policy, in circumstances where it would be perceived to be unjust to allow a loss to go uncompensated, having nothing to do with

parties' intentions, or what was in the contemplation of both of them, at the time of contracting. It follows that insofar as the pursuer pleads that Lynnet, a wholly owned subsidiary to whom the pursuer has granted a licence to occupy and trade from the premises, has suffered loss due to the defender's breach of contract it has pled a relevant case. If it does recover damages for that loss, it must account for those damages to Lynnet.

[39] For completeness the Dean attacked the pursuer's pleadings on two other subsidiary grounds. First, he submitted that the contractual relationship between the pursuer and Lynnet expressly provided that the pursuer had no liability to Lynnet for any loss they might sustain, hence the pursuer could not sue for damages on Lynnet's behalf. However the short answer to that is that the obligation to account arises from the recovery of damages itself, not from any pre-existing or contractual obligation to account. Second, he submitted that the lease prohibited assignation, sub-letting or dealing with the tenant's interest in any way; there was no suggestion that Lynnet occupied the premises under any permissible assignation; and it was contrary to principle to allow the pursuer to recover Lynnet's loss in those circumstances. Again, there is a short answer to these points, namely that they do not arise on the Lord Drummond Young approach, as the Dean accepted. In any event I consider that if a claim which would otherwise exist is not available to the pursuer purely because of the terms of the lease, then it is for the defender to raise that issue in its defences, which it has not done.

Disposal

[40] I will repel the defender's second and seventh pleas-in-law and allow parties a proof before answer. The defender having been wholly unsuccessful, I will find it liable in the expenses of the debate. I will also put the case out by order to discuss further procedure.